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## The Irrelevance of Creativity: Feist's Wrong Turn and the Scope of Copyright Protection for Factual Works

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## Articles

# The Irrelevance of Creativity: *Feist's* Wrong Turn and the Scope of Copyright Protection for Factual Works

Marc K. Temin\*

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According to the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co.*,<sup>1</sup> the requirements for copyright infringement are “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.”<sup>2</sup> Thus, given ownership of a valid copyright, copying of “constituent elements of the work that are original” is both a necessary and sufficient condition for infringement of the work. The apparent simplicity of this formulation is, however, misleading, because the Court added a novel creativity requirement to the traditional understanding of what constitutes an original work of authorship, a requirement that plays a critical role in determining the scope of copyright protection for factual works.<sup>3</sup> The addition was based on confusion between language and the world, and the resulting formulation conflates the roles of the two parts of Section 102 of the Copyright Act and muddles the purpose of Section 102(b). The concept of creativity should be irrelevant in determining the scope of copyright protection for factual works, which is explained by the purpose of such works: the communication of information. Repetition of the *Feist* formulation confuses copyright law in critical respects and hinders progress as copyright law seeks to address new forms of communication and new areas of technology.

#### The Confusion Underlying *Feist Publications, Inc. v. Rural Telephone Service Co.*

Despite the Court's requirement in *Feist* that the copied constituent “elements” of a work be original,<sup>4</sup> the Court did not mean to require that the individual words or other smallest components of a literary work be original in themselves; a literary work need not consist of neologisms in order to be protected against copying. It is sufficient, under *Feist*, that components that are not necessarily original in themselves, *e.g.*, words of a natural language, be combined—“selected, coordinated, and arranged”<sup>5</sup>—in a way that creates “constituent elements . . . that are original.”<sup>6</sup> The problem with this formulation lies in part with the

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1. 499 U.S. 340 (1991).

2. *Id.* at 361.

3. *Id.* at 345-46.

4. *Id.* at 361.

5. *Id.* at 358.

6. *Id.* at 361.

meaning of the word “element” but primarily with the Court’s construction of the word “original.” A work is not “original,” according to *Feist*, simply because it was created without being copied from any other work, even if its words are arranged in a way in which words have never before been arranged. In addition to having been independently created, the work must “possess[] at least some minimal degree of creativity.”<sup>7</sup> Originality, as required for copyright protection, “requires independent creation *plus a modicum of creativity*.”<sup>8</sup>

Thus, copying a substantial portion of an independently created literary work does not necessarily constitute infringement.<sup>9</sup> For example, in *Feist* the Court held that Feist’s copying of a substantial number of Rural’s “white pages” telephone directory listings was not infringement. The reason it was not, according to the Court, lies in the concept of originality, and specifically in the Court’s finding in that concept of a “creativity” component.<sup>10</sup> Rural’s listings were not original constituent elements of its literary work because, according to the Court, *facts* are not original.<sup>11</sup> “[F]acts do not owe their origin to an act of authorship” but are “merely discovered” by those who then “find and report” them.<sup>12</sup> Since the facts themselves were not original, and Rural had not “selected, coordinated, or arranged these uncopyrightable facts in an original way,”<sup>13</sup> it had not shown “the minimal creative spark required by the Copyright Act and the Constitution.”<sup>14</sup>

This is a strange answer, because it is an answer to the wrong question. The question was not whether *facts*—the things that the telephone listings were *about*—were original, but whether *the listings themselves* were original, for it was the copying of the listings that was at issue. It is no surprise that *facts* are not created by authors. Facts are not literary works, and so would not be entitled to copyright protection no matter who created them. Nor do they need such protection, because it is not even clear what it would mean to copy facts. Doing so would require not an infringer but a magician (or perhaps a Creator).

Of course, if by “copying facts” we mean copying a listing, account, or description of facts, it is clear what *that* means, and we know how to do it. But listings, accounts, and descriptions *were* created by authors—they “owe their origin to an act of authorship”<sup>15</sup>—and so *can* be original,

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7. *Id.* at 345.

8. *Id.* at 346 (emphasis added).

9. *Id.* at 361.

10. *Id.* at 362-64.

11. *Id.* at 350, 361.

12. *Id.* at 347.

13. *Id.* at 362.

14. *Id.* at 363.

15. *Id.* at 347.

in the standard sense of having been independently created by their author.<sup>16</sup> The Court's argument that *facts* are not created by authors<sup>17</sup> does not explain why copying Rural's telephone listings, which were indeed created by authors, does not constitute infringement.

In short, the Court's explanation in *Feist* of "why facts are not copyrightable"<sup>18</sup> fails to address the issue before the Court. If by "facts" the Court is referring to things in the world, such as the fact that the world is round, or the fact that Tom Jones' address is 155 Boston Street and his phone number is 545-343-1999, then indeed they are not created by authors and in that sense are not creative or original. But they are also not literary works or parts of them, so no one ever thought they could be created by authors or subject to copyright protection. If, on the other hand, by "facts" the Court means *accounts* of facts, such as the telephone listings in Rural's white pages, then they will (unless copied from another work) have been created by their author, and so be "original" in the standard sense of having been independently created. The claim that *facts* are not created by authors, therefore, provides no support for the conclusion that Rural's telephone *listings* are not entitled to protection against copying. A reader who copied listings would not be copying facts, which the Court understandably said were not created by an author, but instead language describing facts, which *was* created by an author. The Court's metaphysical account therefore does not explain why copyright protection does not extend to such copying.

### The Irrelevance of Creativity to the Scope of Copyright Protection

#### *Sources of the Confusion*

The conflation of language and the world pervades *Feist*, starting with the Court's formulation of the task before it as one of resolving the tension between the non-copyrightability of facts and the copyrightability of compilations of facts.<sup>19</sup> There is, however, no tension here, and no

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16. See *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) ("['Original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author.'"]; Alan T. Dworkin, *Originality in the Law of Copyright*, 39 B.U. L. REV. 526, 536 (1959) ("Originality in current usage connotes only that one's work must be his own, in that it is not copied directly or indirectly from the work-product of another."); I PAUL GOLDSTEIN, COPYRIGHT § 2.2.1 at 2:6 (2d ed. 2000) (hereinafter GOLDSTEIN) ("For purposes of copyright protection, a work is original if, and to the extent that, it has not been copied from another source."). Prof. Goldstein goes on to discuss delicately the "gloss" on the originality requirement added by the Court in *Feist*. *Id.* at 2:8-2:12.

17. *Feist*, 499 U.S. at 347.

18. *Id.* at 345.

19. *Id.*

mystery. *Facts* are not literary works and so may not be copyrighted. *Compilations of facts* are literary works and so, if independently created, ordinarily are entitled to copyright protection (although the scope of that protection must be determined). The Court, ignoring the difference between the world and the words that describe it, creates a factitious mystery that it tries to resolve by adding to the standard concept of originality the requirement of a "minimal degree of creativity."<sup>20</sup> But if we are clear about the difference there is no reason or need to change our ordinary understanding of originality, as applied to literary works, as requiring simply independent creation.<sup>21</sup>

The Court's metaphysical explanation of why works that "consist of nothing but raw data—*i. e.*, wholly factual information not accompanied by any original written expression,"<sup>22</sup> should not receive copyright protection was accompanied by its account of how an author of a factual work might nonetheless obtain copyright protection: by "cloth[ing] facts with an original collocation of words,"<sup>23</sup> or by providing a "selection or arrangement" of facts that "display[s] some minimal level of creativity."<sup>24</sup> However, neither of these alternatives can survive recognition of the failure to distinguish between language and the world. If facts are things in the world not created by authors, we can neither

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20. *Id.*

21. The Court cited the Trade-Mark Cases, 100 U.S. 82 (1879), in support of the proposition that being a "Writing" of an "Author," as provided in the Article I, Section 8, Clause 8 of the Constitution, requires creativity beyond that necessary to create a literary work independently. *Feist*, 499 U.S. at 347. However, the conclusion of lack of originality in the *Trade-Mark Cases* was based on the fact that a "trade-mark may be, and generally is, the adoption of something already in existence as the distinctive symbol of the party using it," and the trademark arises out of its use, not out of the creation of a new symbol. 100 U.S. at 94. Thus a trademark does not even require the creation of a literary work. In *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), upon which the Court in *Feist* also relied for its creativity requirement, the Court upheld the copyrightability of photographs against the challenge that they involve "the mere mechanical reproduction of the physical features or outlines of some object animate or inanimate, and involves no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture." 111 U.S. at 59. It found that, at least for the photographs before it, there was sufficient "originality, of intellectual production, of thought, and conception," to support a copyright. *Id.* at 60. However, a literary work that is original in the standard sense of not having been copied from another work, even one such as a telephone book, does not result simply from a mechanical operation of copying, which created the need in *Burrow-Giles* for the Court at least to consider whether photography had an intellectual component justifying copyright protection. Other decisions cited by the Court simply support the proposition that facts are not copyrightable, not that a literary work created by an author must pass an additional creativity hurdle, beyond independent creation, in order for copyright protection to subsist in it.

22. *Feist*, 499 U.S. at 345.

23. *Id.* at 348.

24. *Id.* at 358.

clothe them with words nor pluck them out of the world to select or rearrange them. Tom Jones and his telephone number will remain unaffected by the choices made by the author of a white pages telephone directory, whether they are choices of wording, selection, or arrangement.

The Court's confusion in *Feist* was facilitated by the ambiguity of the terms "information" and "data."<sup>25</sup> Each term can be used to refer either to a linguistic entity, e.g., the sentence "Tom Jones' address is 155 Boston Street and his phone number is 545-343-1999," or to whatever such a linguistic entity denotes—presumably in this case, if the sentence is true, the fact that Tom Jones' address is 155 Boston Street and his phone number is 545-343-1999. A factual compilation can "consist of nothing but raw data"<sup>26</sup> only in the former sense, but in that sense it is a linguistic entity that is indeed created by its author. If, however, by "data" or "information" we mean whatever non-linguistic entity in the world a listing or sentence tells us about, then a factual compilation cannot consist of such things, because they do not consist of words or symbols.

Thus when the Court asks in closing, "did Feist, by taking 1,309 names, towns, and telephone numbers from Rural's white pages, copy anything that was 'original' to Rural?"<sup>27</sup> the answer, if the Court is referring to the listings in Rural's telephone white pages, is "Yes." Assuming that Rural did not copy the entries from anyone else, the listings were original to it, in the standard sense of Rural having independently put one word after another to create them. Of course, if the Court is referring to the things in the world to which the listings refer, such as towns in Northwest Kansas, those things were not "original" to or created by Rural. But neither were such things copied by Feist. Monument, Kansas remains where it was, uncopied and unaffected by Rural's or Feist's references to it. All that Feist took, or could take, was part of a literary work created by Rural.

The Court's justification of its own negative answer to its closing question simply trades on the ambiguity of the terms "data" and "information."<sup>28</sup> The Court's confident contention that "these bits of information are uncopyrightable facts; they existed before Rural reported

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25. *Id.* at 361.

26. *Id.* at 345.

27. *Id.* at 361.

28. *Id.* ("Certainly, the raw data does not satisfy the originality requirement. Rural may have been the first to discover and report the names, towns, and telephone numbers of its subscribers, but this data does not 'owe its origin' to Rural. *Burrow-Giles*, 111 U.S. at 58. Rather, these bits of information are uncopyrightable facts; they existed before Rural reported them and would have continued to exist if Rural had never published a telephone directory.").

them and would have continued to exist if Rural had never published a telephone directory”<sup>29</sup> is especially striking: the people and towns of Northwest Kansas, and the numbers assigned to them as telephone numbers, would certainly have continued to exist whatever Rural or Feist did or did not write, but *they* were not what Feist copied. In our current digital world, what Feist copied was in all likelihood indeed “bits of information”<sup>30</sup>—the digital form of the literary work that Rural created—and those bits did not exist before Rural created its directory and existed only in the form of that directory.

### *Creativity Without the Confusion?*

Is there any reason to accept the Court’s creativity requirement once the metaphysical confusion that pervades the Court’s argument is discounted? Some might still believe that if one is merely reporting “raw facts,”<sup>31</sup> such as Rural’s telephone listings, one has not shown sufficient creativity to deserve the benefits of copyright protection. Even if one does not confuse language and the world, one might argue, a work that merely states straightforward facts is not “original” enough to be entitled to protection. This argument is wrong for several reasons that are important to the nature of copyright protection for factual works. I will address some of those reasons at greater length below, but it is useful to set them out initially here.

First, although the modified creativity argument may not expressly rest on the conflation that pervades *Feist*, it remains infected by the idea that, at least in simple cases, natural language simply copies or mirrors the world. But that is never the case. Language is a discrete combinatorial system in which a writer must select one word after another to create meaningful sentences. The defining characteristic of natural language is that one can, in this way, create a potentially infinite number of different meaningful sentences, *i.e.*, convey a potentially infinite amount of information.<sup>32</sup> Even in the simplest factual work, a creative act, of which only human speakers of natural languages are capable, is being carried out.<sup>33</sup>

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29. *Id.*

30. *Id.*

31. *Id.* at 350.

32. See STEVEN PINKER, *THE LANGUAGE INSTINCT* 84 (1994); RAY JACKENDOFF, *THE ARCHITECTURE OF THE LANGUAGE FACULTY* 3 (1997).

33. Thus, as discussed *supra*, note 21, the Court’s reliance on *Burrow-Giles*, which cited the “intellectual invention” required to produce certain photographs in finding that they were entitled to copyright protection, 111 U.S. at 60, is inapposite to the case of natural language, which does not involve mirroring the world in the way that those opposing the copyrightability of photographs might have argued that photographs do, but involves creating information about the world by means of a discrete combinatorial



More generally, the argument's picture of the relation between language and the world is misguided. The world does not come to us divided into "raw facts" labeled by sentences through which the facts "speak for themselves,"<sup>34</sup> and it is not made up of individual facts for which there is one "real" description, with other descriptions constituting "expressive" flourishes that copyright law can protect. If instead of writing, "Tom Jones' address is 155 Boston Street and his phone number is 545-343-1999," an author writes, "The studious Tom Jones lives at number 155 on upscale Boston Street, with the easily remembered phone number 545-343-1999," is she "expressively" describing the same raw fact as in the simpler description, or is she instead accurately describing—letting it "speak for itself"—a more complex fact that includes attributes of Tom Jones and his address and phone number? What one finds in the world, after all, is Tom Jones, who is studious, skinny, likes to ski, is from Buffalo, and so on ad infinitum. Once we move beyond a picture of the world being divided into "raw facts" to which a writer might pin "creative" labels, there is no way in principle to distinguish between an author using "an original collocation of words"<sup>35</sup> to clothe simple facts in original garb—thus, according to *Feist*, being entitled to copyright protection because of that "expressive element"<sup>36</sup>—and an author letting more complex facts "speak for themselves" with the same words, and thus failing to qualify for copyright protection.<sup>37</sup>

The example facing the Court in *Feist*, telephone listings requiring little "creativity" to discover and presented in only a few simple words and numbers,<sup>38</sup> misled the Court into associating "raw facts" with a lack of creativity and consequently of trying to explain through a creativity requirement the need to permit such information to be copied.<sup>39</sup> But the simplicity of a fact is no indication of the creativity, in the standard sense, required to unearth it. Facts, even "raw facts," come in all kinds. A listing of the atomic numbers of elements is even simpler than a telephone listing ("Hydrogen, 1; Helium, 2; . . ."). One might therefore say, with a bit of exaggeration of Henry Moseley's personal accomplishments, what the Court says of Rural's telephone listings in denying them copyright protection for lack of creativity: "Moseley may have been the first to discover and report the atomic numbers of the

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system.

34. *Feist*, 499 U.S. at 349.

35. *Id.* at 348.

36. *Id.* at 349.

37. *Id.*

38. *Id.* at 362-63.

39. *Id.* at 361-63.

elements, but this data does not 'owe its origin' to Moseley."<sup>40</sup>

But it is hardly a lack of creativity on the part of the discoverers of atomic numbers that leads us to permit the copying of a list of such numbers. Nor should copyright law be in the business of evaluating the creativity of factual or scientific discovery. If we do not confuse language and the world, the idea of courts determining copyright protection by ranking facts in terms of creativity, or even determining which facts require a "modicum of creativity"<sup>41</sup> to discover, is no more appealing than the idea of courts determining such protection by evaluating works of art.<sup>42</sup>

A second reason to reject the Court's account, even as modified, is that, reflecting its underlying confusion between language and the world, the account requires more than an evaluation of the *creativity* of a factual work: it requires an evaluation of its *truth*. In the Court's view, a *true* factual work would face the obstacle to copyright protection that its author had only discovered, not created, the facts recounted, but the author of a *false* factual work would face no such obstacle. To the contrary, the author of the false work would, perhaps unknowingly, have exhibited sufficient "creativity" to concoct something that did not exist, and so, under the Court's explanation, be entitled to copyright protection. This objection to the Court's account, dispositive in itself, arises out of the fact that the account depends on an alleged metaphysical relationship between the world and an "original" work of authorship, instead of on the purpose of a factual work, as discussed further below.

Third, as also discussed below, by adding a creativity element to the "originality" requirement, the argument confuses the general structure of copyright law and the statutory scheme that reflects it. A literary work must, on this view, have a modicum of creativity in order to qualify as an original work of authorship in which copyright protection may subsist,<sup>43</sup> but since that modicum of creativity may be found in any part of the work, the issue of the scope of protection remains. The Court therefore limits such protection to the "original," *i.e.*, the original+creative, "elements" of a work, making each determination of the scope of infringement into a test of "creativity" and ignoring both the separation

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40. Henry Moseley discovered that the arrangement of elements in the periodic table on the basis of their chemical attributes could be explained by their atomic numbers, representing the number of units of positive charge, *i.e.*, protons, in each element. See *ENCYCLOPEDIA OF PHYSICS* 82 (Rita G. Lerner & George L. Trigg eds., 2d ed. 1991).

41. *Feist*, 499 U.S. at 346.

42. See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) ("It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.").

43. *Feist*, 499 U.S. at 362.

of Section 102 of the Copyright Act into two parts with distinct tasks and the traditional idea/expression distinction.

Fourth, the introduction of a creativity requirement is unnecessary, for the scope of copyright protection can be properly limited without it, simply by recognizing the different purposes of fictional and factual works. Limiting the scope on the basis of a work's purpose not only avoids the metaphysical confusion and misunderstanding of language inherent in the creativity requirement but also enables us to make rational and informed determinations about the proper scope of protection in light of the various considerations that should govern them.

The Court's addition in *Feist* of a "creativity" requirement to the standard concept of originality, in order to explain the limited scope of copyright protection for factual works, had little to recommend it beyond the apparent simplicity of the Court's argument. Once it transpires that the argument is based on an equally simple confusion, it is time to look elsewhere for an explanation of the limitation.

### The Paradox of Copyright Protection and its "Solution"

#### *Protected and Unprotected Matter*

There is indeed a tension underlying copyright law as it applies to literary works, but it is not the tension described by the Court in *Feist*, and it does not depend on a metaphysical confusion. The tension is so strong as to amount to a paradox, the *paradox of copyright protection*: the value of literary works lies largely in the information they convey, *i.e.*, their content,<sup>44</sup> and that value is largely dependent on such content

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44. I will not try here to define the term "information" but will rely on the common understanding of the term. Although I am not using the term "information" in the engineering sense as defined by Claude Shannon or in any other technical sense, Shannon's explication, focusing on information as a reduction in uncertainty, reflects an important aspect of the ordinary understanding of the concept. See Claude E. Shannon, *A Mathematical Theory of Communication* (pts. 1 & 2), 27 BELL SYSTEM TECHNICAL JOURNAL 379, 623 (1948), reprinted in CLAUDE E. SHANNON & WARREN WEAVER, *THE MATHEMATICAL THEORY OF COMMUNICATION* (1949).

Similarly, the concept of content used in this article is easy to understand in a casual sense but difficult to define, and common terminology is uncertain and can be confusing. I will typically use the term "content" to refer to that which is conveyed by literary works. I will sometimes use the term "factual content" to refer to content that purports to be true, whether or not it succeeds in being so. (In contrast to the need for a distinction in copyright law between fictional and purportedly factual works, there is no general need for a distinction between purportedly factual works that are true, in whole or part, and those that are false, in whole or part.) The term "content" is generally preferable to the term "information" for the purpose of this article for several reasons, including the fact that "content" does not share the technical connotations of "information"; "content," unlike one sense of "information," does not imply the truth of what is asserted; and

being further transmitted, *i.e.*, copied, in other literary works; yet copyright law promotes the creation of literary works by prohibiting their being copied.<sup>45</sup> The solution to the paradox, to the extent that there is one, lies in the distinction between *protected* and *unprotected* matter. Copyright law promotes the advancement of knowledge, pursuant to the Copyright Clause,<sup>46</sup> through encouraging the creation of *protected* works, which may not be copied, but whose *unprotected* content may be copied, including copied for use in other works. It is such *unprotected content* that is valuable, in large part *because* it may be freely copied, and copyright law is only a means to the end of promoting the creation and dissemination of such matter. By promoting the creation of protected matter by prohibiting its being copied, copyright law promotes the creation of unprotected matter, which is not protected against *copying* but must be protected, or “immunized,” as it were, against *copyright law*, so as not to interfere with its further transmission.<sup>47</sup>

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“content” reflects the dual aspect of a container—the literary work—and what is contained in it, which “information” does not. However, it is not practical to use only one term in this context, for both primary and secondary sources frequently use other terms for the same or a similar purpose, *e.g.*, “facts,” “ideas,” “information,” “data,” and “discoveries.” I will frequently use the term “information” with the same meaning as “factual content.”

45. Although the term “paradox of copyright protection” may or may not be novel, the recognition of a tension underlying copyright law and the problems it creates is, of course, common. *See, e.g.*, CCC Info. Servs., Inc. v. Maclean Hunter Market Reports, Inc., 44 F.3d 61, 69 (2d Cir. 1994) (“The contradiction between these imperatives, one calling for the protection of creations that will advance the progress of knowledge, the second requiring that these same creations be free of protection, has understandably given rise to bewildering problems of interpretation as to whether copying has been of protected expression or of the unprotected ideas underlying the expression.”).

46. The Constitution grants Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8. Within the clause, the term “Science” is to be read with the terms “Authors” and “Writings,” with the “exclusive Right” being that of copyright, while the term “useful Arts” is to be read with the terms “Inventors” and “Discoveries,” with the exclusive rights being patent rights. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 56 (1884); *Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 100 (2d Cir. 1951); I WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 123 (1994). I use the term “Copyright Clause” to refer to the portion of Clause 8 dealing with copyright: “To promote the Progress of Science . . . , by securing for limited Times to Authors . . . the exclusive Right to their respective Writings. . . .” U.S. CONST. art. I, § 8, cl. 8.

47. The paradox of copyright protection affects primarily literary works, and the discussion in this article applies only to such works. Other types of work in which copyright protection subsists (except dramatic works that are also literary works) have different structures and purposes and raise different issues, and there is no reason to believe that a single non-tendentious criterion can determine the scope of protection for all of them. As noted above, *supra* note 21, the Court’s effort in *Feist* to support its addition of a creativity requirement with the Trade-Mark Cases, 100 U.S. 82 (1879), and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), failed in part because the subject matter of those cases made the basis for and scope of trademark or copyright

*The Roles of Sections 102(a) and 102(b)*

In the Copyright Act these two tasks are parceled out between Section 102(a), granting copyright protection to literary works, and Section 102(b), immunizing certain content of those works against the protection granted by Section 102(a). In order for copyright protection to subsist in a work under Section 102(a), it need only be an "original work[] of authorship,"<sup>48</sup> *i.e.*, a work independently created by its author and fixed in a tangible medium from which it can be perceived. Such a work then constitutes protected matter, except to the extent that the protection is limited by Section 102(b)'s recital of unprotected, *i.e.*, immunized, matter.<sup>49</sup>

What makes the *Feist* Court's metaphysical wrong turn to Section 102(a) and the concept of creativity particularly puzzling is that it was unnecessary, for the explanation of the lack of copyright protection for Rural's listings was before it in Section 102(b). The Court even at one point observed that "Section 102(b) is universally understood to prohibit any copyright in facts,"<sup>50</sup> but instead of seeing the provision as an independent restriction on the scope of copyright protection, the Court took it as an endorsement of its own explanation "that facts are never original. . . ."<sup>51</sup> To the contrary, Section 102(b) says nothing of the sort, any more than it says that ideas (to which, unlike facts, it expressly refers) are never original. Copyright protection does not extend to original ideas any more than it does to unoriginal ones, and it does not extend to facts, however much creativity did or did not go into discovering them.

Sections 102(a) and (b) thus divide between them the two tasks—determining the works in which copyright protection subsists, and determining the scope of such protection—that *Feist* squeezes entirely into the concept of originality, and so into Section 102(a). Section 102(b), which makes no mention of originality except in using Section 102(a)'s term "original work[] of authorship,"<sup>52</sup> has the statutory task of setting limits to copyright protection. There is no need to smuggle those limits into Section 102(a), and so no need to understand the term "original" in that section in other than its straightforward sense of having been independently created.

The Court in *Feist* disrupted this allocation of responsibilities by

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protection significantly different.

48. 17 U.S.C. § 102(a) (2000).

49. 17 U.S.C. § 102(b) (2000).

50. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 356 (1991).

51. *Id.* at 360.

52. 17 U.S.C. § 102(a).

finding a limitation on the scope of copyright protection in Section 102(a).<sup>53</sup> The Court read into the term “original” a creativity requirement that amounts to a restriction on the scope of coverage of original works of authorship.<sup>54</sup> The extent of the disruption was masked in *Feist* by the fact that Rural’s directory contained “some foreword text, as well as original material in its yellow pages advertisements,”<sup>55</sup> so that the work as a whole had the “modicum of creativity”<sup>56</sup> necessary to obtain a copyright. In the absence of such extraneous text, given the Court’s analysis, no copyright protection would have subsisted in the work at all.

Continuing to blur the roles of Sections 102(a) and (b), the Court used its originality+creativity requirement not only to limit the works in which copyright protection subsists under Section 102(a), but also to determine the scope of that protection, thereby virtually ignoring the existence of Section 102(b).<sup>57</sup> Not only did Rural’s work as a whole have to meet the originality+creativity requirement, but there would be infringement only if the “constituent elements” that were copied were also “original” in the Court’s strengthened sense.<sup>58</sup> Combining its conflation of individual listings with the facts that they describe and its addition of a “creativity” element to the concept of originality intended to apply to entire works, the Court justified its holding on the grounds that Rural did not create the facts that its listings report.<sup>59</sup> Its argument for that conclusion made no reference to Section 102(b) or to the idea/expression or fact/expression distinctions,<sup>60</sup> all of which were made superfluous by the Court’s sole reliance on its originality+creativity requirement.

The *Feist* Court made a perfunctory effort to connect Section 102(a) with Section 102(b) through the idea/expression or fact/expression distinction. It observed that to promote science and technology, “copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. . . . This principle, known as the idea/expression or

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53. *Feist*, 499 U.S. at 345, 355.

54. *Id.* at 345.

55. *Id.* at 361.

56. *Id.* at 346.

57. Having described the originality+creativity required in order for copyright protection to subsist in a work, the Court added, “The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author.” *Id.* at 348.

58. *Id.* at 361.

59. *Id.*

60. *Id.* at 361-64.

fact/expression dichotomy, applies to all works of authorship.”<sup>61</sup> The Court explained that the reason why “no author may copyright facts or ideas” is that “[t]he copyright is limited to those aspects of the work—termed ‘expression’—that display the stamp of the author’s originality.”<sup>62</sup> Under this account, the “expression” in a work is original, and so is protected against copying under Section 102(a), while such protection does not extend to the unoriginal other half of the dichotomy, Section 102(b) content.

However, the concept of originality, and especially the concept of originality+creativity, plays no role in Section 102(b), nor in the idea/expression distinction. The progress of science and technology is, after all, most supported by the creation of works embodying *original* ideas, procedures, processes, systems, methods of operation, concepts, principles, and discoveries,<sup>63</sup> so Section 102(b) cannot be *denying* protection to those items on the grounds that they are not original. Moreover, the Court found that Section 102(b) applies to facts by equating facts with the “discoveries” referred to in the section.<sup>64</sup> Yet discoveries, like ideas and the other items referred to in the section, can be original; indeed, they are so almost by definition. Thus facts, in the sense in which they are immunized from copyright protection under Section 102(b), can, like other Section 102(b) content, be original. They can also be unoriginal, and it makes no difference to Section 102(b) or to the idea/expression or fact/expression distinctions.<sup>65</sup>

### Section 102(b) and the Immunization of Content

Section 102(b) immunizes against copyright protection the left-hand side of the idea/expression and fact/expression distinctions. Contrary to *Feist*, the underlying distinction (or “dichotomy” in the Court’s

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61. *Id.* at 349-50 (citation omitted).

62. *Id.* at 350 (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985)).

63. See 17 U.S.C. § 102(b).

64. *Feist*, 499 U.S. at 356 (“Section 102(b) is universally understood to prohibit any copyright in facts,” citing *Harper & Row*, 471 U.S. at 547, 556. *Accord*, 1 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03[E] (2006) [hereinafter NIMMER] (equating facts with “discoveries”).

65. The irrelevance of originality, in the standard sense or the *Feist* Court’s enhanced sense, to Section 102(b) content accounts for the fact that the two elements of infringement according to *Feist*—“(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original,” *id.* at 361—are in fact not sufficient for infringement. The ideas in a work are constituent elements of it, but copying original constituent ideas in a work does not constitute infringement. In the case of purportedly factual works that are in fact false, copying portions of such works that are necessary to convey their purportedly factual content would typically not constitute infringement, but such non-factual elements of the work would be “original” in the Court’s sense.

terminology) the section relies on is not between the unoriginal and the original but between content and the language that communicates it. We use language to communicate ideas, concepts, discoveries, and other Section 102(b) content. The literary works in which we communicate them may be protected by copyright, but those works' Section 102(b) content—"the ideas and information conveyed by a work"<sup>66</sup>—is not protected. The reason goes to the core of the purpose of copyright law: we want ideas and discoveries to be communicated as widely as possible, not only through the literary works that initially present them but also in other literary works written by readers of the originals, works that pass on those ideas and discoveries to others, modify and elaborate on them, and generally engage in discussion of them, thus promoting "the Progress of Science and useful Arts."<sup>67</sup> We grant copyright protection to literary works so that they will set forth Section 102(b) content to be communicated to others without restriction on the further use or communication of such content. To permit copyright protection to extend to such content would therefore undermine the very purpose of copyright law.<sup>68</sup>

The value of ideas and information lies partly in the fact that they are, for practical purposes, public goods. Public goods are nonrival and nonexclusive: for any given level of production, the marginal cost of providing them to an additional person is zero, and additional people cannot be excluded from consuming them.<sup>69</sup> However, like other public goods, information may have a substantial cost of creation; significant investment of time, money, labor, and creativity is often required to create information. "[I]nformation is expensive to produce, cheap to reproduce, and [therefore] difficult to profit from."<sup>70</sup> This situation

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66. *Id.* at 350.

67. *Id.* at 349 (quoting U.S. CONST. art. I, § 8, cl. 8).

68. It would be theoretically possible to have a strong form of copyright protection in which the ideas, discoveries, and processes expressed in a literary work *were* protected against copying. (Arthur Miller proposes a limited common law form of protection of ideas, distinguishing it from copyright protection, in Arthur R. Miller, *Common Law Protection for Products of the Mind: An "Idea" Whose Time Has Come*, 119 H.L.R. 705 (2006).) Such protection would be weaker than patent protection, since it would permit independent creation and use of Section 102(b) content even if previously expressed in another work, but stronger than the protection provided under the Copyright Act, which not only permits the copying of Section 102(b) content but exists to promote its creation so as to make it available for copying. Such a strong form of copyright protection would not, of course, subsist in the ideas and discoveries themselves, which are not literary works, but would subsist in literary works in such a strong form as to prohibit the copying of Section 102(b) content.

69. See, e.g., ROBERT S. PINDYCK & DANIEL L. RUBINFELD, *MICROECONOMICS* 648-49 (3d ed. 1995).

70. WILLIAM D. NORDHAUS, *INVENTION, GROWTH, AND WELFARE: A THEORETICAL TREATMENT OF TECHNOLOGICAL CHANGE* 70 (1969). See also Kenneth J. Arrow,



prompts the introduction of a property right to enable the creators of information to profit from their work and so provide an incentive for such creation. That right is copyright, which subsists not in information itself but in the works that contain it.<sup>71</sup> However, if the scheme is to achieve its purpose, the right to profit from those works must not significantly undermine the value of the information in them. Permitting the copyright in a literary work to prohibit the further dissemination of its content would do just that.

Therefore, the Copyright Act, through Section 102(b), *immunizes* ideas, discoveries, and other Section 102(b) content from the copyright protection granted in Section 102(a). Such immunization is independent of the originality of the Section 102(b) content or of the creativity of the literary work that contains such content. Section 102(b) thereby limits the scope of the copyright protection that under Section 102(a) subsists in "original works of authorship"—works that were independently created. It does so in order to ensure that copyright protection for a literary work does not undermine the purpose for which the work was created.

This scheme has no place for the concept of "creativity" introduced in *Feist* as a restriction on the standard concept of originality. We do not want courts to be in the business of evaluating the creativity of factual works, and we do want to encourage the creation—*i.e.*, the independent writing—of all sorts of factual works, including those that report only "raw facts." Indeed, one hopes that it was not the lack of creativity but the need for such raw facts, in the form of white pages telephone listings, that provided the motivation for the *Feist* Court, to its credit and to the

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*Economic Welfare and the Allocation of Resources for Invention*, THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 614-16, National Bureau of Economic Research (1962), *reprinted in* THE ECONOMICS OF COMMUNICATION AND INFORMATION 227, 232-34 (Donald M. Lamberton ed., 1996) (difficulty of optimal allocation of and creating a market for information); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUDIES 325, 326 (1989) (given "public good" aspect of intellectual property, copyright law trades off costs of limiting access to a work against benefits of providing incentives to create the work). *Cf.* JEREMY BENTHAM, 3 THE WORKS OF JEREMY BENTHAM 71 (1843) ("He who has no hope that he shall reap, will not take the trouble to sow. But that which one man has invented, all the world can imitate.").

71. We do not want the property right to subsist in the information itself, for we would then lose the value that the information has in virtue of being nonrival. Nor would we have much success in enforcing such a right, given the difficulty of keeping information from being disseminated. Creating a property right that subsists instead in a particular tangible expression of the information encourages the creation of such an expression, and so of the information and of further means of disseminating it, without (if we properly limit the right) undermining the value of the information and its nonrival nature.

surprise of many,<sup>72</sup> to reverse the Tenth Circuit decision below. Since we want to encourage the creation of all sorts of factual works, the Court's concept of creativity, under which the mere reporting of facts is not creative, got things backwards. It penalizes for a lack of "creativity" the very works, factual works, that primarily "promote the Progress of Science and useful Arts."<sup>73</sup> Given the utilitarian purpose of the Copyright Clause, it would be counterproductive to establish a "creativity" requirement for obtaining copyright protection that by its nature affects only factual works, especially when it affects them not because the process of producing a factual work is necessarily any less creative than that of producing a fictional one, but simply because "facts do not owe their origin to an act of authorship."<sup>74</sup> The reason to provide an incentive for the creation of literary works is to obtain the benefit of the content of those works, and especially, given the Copyright Clause, their factual content. By focusing on its concept of creativity, the Court diverted discussion from its proper focus of how to keep copyright protection from unduly interfering with obtaining the full benefit of the content of a work to fruitless discussions of the nature of the required creativity.

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72. See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 198 (rev. ed. 2003) [hereinafter *COPYRIGHT'S HIGHWAY*].

73. U.S. CONST. art. I, § 8, cl. 8. The Court's denigration in *Feist* of the "sweat of the brow" doctrine was justified insofar as the doctrine "handed out proprietary interests in facts and declared that authors are absolutely precluded from saving time and effort by relying upon the facts contained in prior works," *Feist*, 499 U.S. at 354. Sometimes, however, the Court appeared to confuse the rejection of a proprietary interest in facts with a rejection of copyright for a work that consists "merely" of a collection of facts, on the grounds that it does not exhibit sufficient creativity. An author who industriously collects, or even lazily collects, facts and then creates, as opposed to copies, a directory of them has created a literary work that should, as such, be entitled to copyright protection. That copyright does not, of course, prohibit another from proceeding to collect the same facts and creating, not copying, his own directory of those facts. Nor—and this is where some "sweat of the brow" decisions went wrong—does it prohibit another from using the first author's directory as a source of information, on the way to creating her own directory that is, to the extent reasonably possible, different in wording, organization, and selection. However, as discussed below, a determination of whether a second directory infringes the copyright in the first does not involve an evaluation of the creativity exhibited by the first.

74. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991). A focus on the author's creativity rather than on the utility of a work is characteristic of a copyright regime incorporating a doctrine of moral rights, such as that of French copyright law, rather than the utilitarian American regime. See, e.g., *COPYRIGHT'S HIGHWAY* 135-61 (Ch. 5, "The Two Cultures of Copyright").

## The Significance of a Work's Purpose

### *Immunizing Ideas Under the Nichols Model in Fictional Works*

Not all content of a literary work is immunized by Section 102(b). For example, most content of fictional works, such as the details of plot, characters, and settings, is not immunized. The content of fictional works below the level of ideas is not Section 102(b) content because it is not the purpose of fictional works to convey the stories they tell so that such stories may be repeated in other works. Fictional works serve their primary purpose simply through being read by readers for their enjoyment and edification. Since their stories are not factual, there is no need to repeat them in order to advance science and technology, or to advance knowledge in general.

However, providing enjoyment and edification to readers is only one, albeit the primary, purpose of fiction. Another purpose is to provide ideas that may be freely discussed and communicated and used by other authors in creating other fictional works. That purpose does affect the advancement of knowledge, and Section 102(b) keeps copyright protection from interfering with it by immunizing ideas, even if they appear in fictional rather than factual works.

Judge Hand's decision in *Nichols v. Universal Pictures Corp.*<sup>75</sup> sets out how the process works in the case of fictional works. One abstracts from the details of plot, character, and setting of a fictional work until reaching the level of "ideas."<sup>76</sup> That level of abstraction, to which copyright protection does not extend, is determined to some extent by the meaning of the term "idea" but more usefully as the boundary above which we do not want to prohibit others from using the work's content.<sup>77</sup> Such a prohibition would unduly restrict the range within which other authors may work by depriving them of stories (plots, settings, and characters at a certain level of abstraction) that could be learned from the work and used to create new works—the "building blocks" or tools of their trade. An accused work infringes an original work only if there is sufficient copying at levels of abstraction below the level of ideas.<sup>78</sup>

Under the *Nichols* model, an author has two types of "means of expression" to fill in the right-hand side of the idea/expression distinction: (a) content-based means of expression, *i.e.*, the details of plot, character, and setting, and (b) word-based means of expression, *i.e.*,

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75. 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

76. *See id.* at 121.

77. *See id.*

78. *See id.*

the specific wording chosen to present those details.<sup>79</sup> If the work is original in the straightforward sense of having been independently created, neither the creativity of the ideas expressed nor that of their means of expression, whether content-based or word-based, is relevant to the issue of the subsistence of copyright protection in the work or of its infringement.

This level of copyright protection for fictional works permits such works to communicate content—their ideas—that may be used by other authors, while restricting the reuse by other authors of the means of expressing those ideas. The combination appears to do justice to the purpose of fictional literary works: communicating ideas (at least in some cases) for further use while entertaining and edifying through the means of presentation of those ideas.

### *Immunizing Content in Factual Works*

Factual works have quite a different purpose, which cannot be served by imposing copyright protection as strong as that appropriate for fictional works. The purpose of factual works is to communicate, for consideration and reuse by others, content not only at the level of ideas but down to the smallest level of detail. As a general matter, all the information in a factual work must be available for reuse by others if such works are to serve their purpose fully.

This difference of purpose means that the step of abstraction, of moving from the specific details of the content of a work to a level that omits some of its content, has different effects in the case of fictional and factual works. In the case of fictional works, little is lost by prohibiting the copying of specific details because the work is not intended to provide factual information through those details, and because such a prohibition does not unduly inhibit the creation of works by other fiction writers or the consideration of the ideas expressed in a work. As one abstracts to broader descriptions of plot and character, there continues to be no problem about copyright protection inhibiting the transmission of factual information, but the potential inhibition of the ability of others to

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79. See *id.* An example shows the difference between the two senses of “expression.” If we apply *Nichols*’ “patterns of increasing generality” (actually, increasing abstraction) to the plot of Shakespeare’s *Romeo & Juliet*, we get to the idea expressed by the sentence, “Two young people from feuding families fall in love, and the family feud leads to tragedy.” Different means of word-based expression of that idea would consist of different wording for the idea at the same level of abstraction, *e.g.*, perhaps, “a young man falls in love with a young woman, and she returns his love, but their families are hostile to each other, and that leads to a sad end.” Different content-based means of expression of the idea would be different detailed plots, one of which might be the specific plot of *Romeo & Juliet*, that show the events described at this high level of abstraction being worked out in a specific way.

create new works and discuss ideas becomes of increasing concern.

Abstraction works differently, however, in the case of factual works, for abstraction, by definition, removes information. A more specific statement contains more information than one derived from it by describing the entities involved less specifically, so it is typically more valuable in advancing the progress of science. Applying to factual works "patterns of increasing generality"<sup>80</sup> in the manner of the *Nichols* model would result in restatements that leave out more and more factual detail and therefore are of less and less use for the advancement of knowledge.

This difference of purpose also means that, for the most part, only one of the two means of expression protectable by copyright in the case of fictional works can be protected in the case of factual works. Content-based means of expression, the details of plot and other fictional elements through which a work of fiction fills out its ideas,<sup>81</sup> cannot be protected against copying in the case of factual works because what are only stories in the case of fictional works are factual information in the case of factual ones. The value of such works lies in communicating that information for use by others, including copying the information into other works, so readers cannot be precluded from copying the information in them if the value of such works is not to be seriously undermined. Only word-based means of expression, the selection of words through which that content is expressed, can be protected against copying.

The term "selection of words" is used here in a broad sense, to include every choice available to an author, from the choice of individual words to the creation of sentences and their organization into paragraphs and higher levels of organization, in order to express certain content. In the case of most types of factual work, there will be many ways of expressing the information in the work, making it possible for other authors to present that material without copying at all closely the sentences or their organization used in the work.

In some instances, however, there are few practical alternatives for

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80. *Id.* Although what Judge Hand means in *Nichols* by "patterns of increasing generality" is clear and correct in context, the terms "generality" and "generalization" instead of "abstraction" can prove misleading. If we generalize from a specific statement, in the sense of saying about a larger group what the initial statement said about a smaller group, the resulting general statement contains more information than the specific one. However, that is not the sort of more "generalized" statement envisioned by *Nichols*, which fits more closely the model of moving from saying that a particular A is B to "Some A's are B's" rather than to "All A's are B's." The statement that a particular A is B contains more information than the statement that some A's are B's and less than the statement that all A's are B's. The term "abstraction" is less likely to misleadingly imply a move to "All A's are B's" than is the term "generalization."

81. *See id.*

presenting the information in a factual work. A telephone directory is such a case. Rural's listing was in the form it was—surname, first name, middle initial, address, and telephone number—not because the listing reflects a raw fact that the author was so lacking in creativity as not to be able to describe more expressively, but because this is the information needed by those who wish to use the directory, and this is the only practical manner in which to present that information. Since it is the only feasible way, it is the standard, indeed “practically inevitable”<sup>82</sup> way. The relevance of such practical inevitability to copyright law is not, however, that it shows a lack of creativity that should deprive an author of copyright protection, but that it requires us to permit close copying if the work is to fulfill its purpose of communicating information that may be used by readers as they see fit. That is what the Court was in fact doing in *Feist*, and it required neither the concept of originality nor that of creativity to achieve that goal. The Court needed only to recognize, as it did tacitly, that copyright protection should not prohibit copying when doing so would make it unreasonably difficult for the information contained in a factual work to be further communicated.

The protected/unprotected distinction is therefore, in the case of standard literary works,<sup>83</sup> the distinction between a literary work and its content available for further dissemination. Copyright protection subsists in the literary work pursuant to Section 102(a), but the scope of that protection depends upon what content, from among that roughly set out in Section 102(b), the work is intended to pass on for further communication by others, and therefore on whether the work is one of (purported) fact or fiction. *Feist* ignored this straightforward interpretation of Section 102 and instead sought to limit from the outset, through the concept of originality+creativity,<sup>84</sup> the matter in which copyright protection subsists. In order to do so it ignored the standard meaning of the term “original” in copyright law to add a “creativity” requirement and sought to enshrine a single distinction, its enhanced original/unoriginal distinction, as the basis for determining the scope of protection in all literary works, whatever their purpose. Not only was its argument based on a metaphysical confusion, but it was unnecessary: the Court's laudable purpose, permitting the copying of Rural's telephone listings, could be accomplished by limiting the scope of protection in

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82. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991).

83. Computer programs are not standard literary works and raise different issues of purpose and scope of protection. Although the general principle that the scope of protection must be limited so as not to undermine the purpose of a work applies to computer programs as well as to standard literary works, I will not discuss computer programs further here.

84. *Id.* at 345.

light of the purpose of a work. Protection is “strong” for works of fiction, not because they are creative but because they do not serve the purpose of conveying information for further use; copyright protection may therefore extend to the stories they tell, be they creative or not. Protection is weaker for factual works because they do have the purpose of conveying information, the stories they tell, for unfettered use by others; their purpose would be undermined by providing the same level of protection as for fictional works. “Thin” copyright protection is not a penalty for lack of creativity but recognition of the purpose of factual works.<sup>85</sup>

### A Principle of Immunity Based on Content

#### *The Inadequacy of the Idea/Expression and Fact/Expression Distinctions*

The items listed in Section 102(b) provide a practical guide to the concept of content that is the basis for the protected/unprotected distinction. They fall under either the idea/expression distinction, which covers the immunity of ideas, concepts, and principles, which may appear in fictional or factual works, or the fact/expression distinction, which covers discoveries and, in a different way, processes, procedures, systems, and methods of operation,<sup>86</sup> all of which appear in factual works. The content of a fictional work to be available for further communication (as opposed to simply enjoyed) begins at the level of abstraction of ideas. Both the idea/expression and fact/expression distinctions are instances of the broader distinction between the content to be communicated by a work (and to be copied in other works) and the means of expression of that content. The difference between them lies in the purpose of the work, *i.e.*, the content to be disseminated by it.

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85. Only the highest level purpose of a work is relevant, that of whether the work is (purportedly) factual or fictional, *i.e.*, whether its purpose is to communicate information rather than to entertain or edify (or however we want to characterize the purpose of fictional works). Given that broad categorization, any subsidiary purpose is ordinarily irrelevant.

86. See 17 U.S.C. § 102(b). The purpose of these four items in the list is to show that, no matter how closely a work describes something in the world, copyright protection does not give the author of the work any rights to that entity as a result of the copyright in the work. As things in the world that may be *described by* a factual work, they are immunized as is any other content of such a work. There should be no need to pigeonhole an entity in the world within any of the specific categories in Section 102(b), for the point is not the special characteristics of those categories but the immunity of things in the world, other than literary works, from the scope of copyright protection. By contrast, if a fictional work describes a procedure that does not actually exist, *e.g.*, an elaborate procedure to be followed in order to destroy an evil wizard, the fictional procedure will not be immunized against copyright protection, in that describing it in another fictional work could contribute toward a finding of infringement by that work.

However, neither the idea/expression distinction nor the fact/expression distinction is suited to the task of determining the scope of copyright protection for factual works. Not only is the *Nichols* concept of "idea" founded on the assumption that the level of ideas lies *above* the level at which the work tells its full story, so that matter below that story-telling level will be protected by copyright law and unavailable for copying,<sup>87</sup> but nothing in the idea/expression distinction otherwise makes it appropriate for use with factual works. By setting the level of ideas at the lowest level of detail, so that the entire story told by a work is considered an idea and is therefore not protectable, one can achieve the goal of permitting the transmission of the work's factual content. But there is no reason, in terms of anyone's (and certainly not Judge Hand's) concept of an idea or the idea/expression distinction, to set the level of ideas at that lowest level. Such a move has no motivation or rational basis in the idea/expression distinction and misses the true reason for different levels of protection being accorded to fictional and factual works: the purpose (and so value) of the work.<sup>88</sup> In sophisticated hands, the idea/expression distinction can provide the basis for thoughtful consideration of the proper scope of protection in a particular instance, but since it is the wrong tool for the job, conclusions based on it are inevitably tendentious and distorted by irrelevant considerations.<sup>89</sup>

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87. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).

88. For example, in *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984), the court stated,

One consequence of the policy in favor of free use of ideas is that the degree of substantial similarity required to show infringement varies according to the type of work and the ideas expressed in it. . . . *Some ideas can be expressed in myriad ways, while others allow only a narrow range of expression.* Fictional works generally fall into the first category. . . .

Factual works are different. Subsequent authors wishing to express the ideas contained in a factual work often can choose from only a narrow range of expression. . . . Therefore, similarity of expression may have to amount to verbatim reproduction or very close paraphrasing before a factual work will be deemed infringed.

*Id.* at 488 (emphasis added). However, under our normal understanding of the term "idea," the ideas expressed in a factual work are not at the lowest level of factual detail but at a higher level of abstraction. Thus recasting the lowest level of detail of factual works, which it must be possible to copy without infringement, as the level of "ideas" in an effort to "explain" the absence of copyright protection actually provides no explanation at all. It simply changes the concept of "idea" to accommodate the conclusion required for another reason, that of permitting the communication of factual content.

89. For example, for neither fictional nor factual works is it relevant, in determining the proper scope of protection, what "idea" the author intended to express. In the case of fictional works, what matters is the level of abstraction at which immunity is granted, which may depend upon the ideas expressed in a work but not upon what the author thinks to be the ideas expressed. That seems apparent in the case of fictional works, but



One might then turn to the so-called “fact/expression” distinction to determine the scope of protection for factual works, but that has amounted to little more than alternative wording for the idea/expression distinction applied to factual works, with no underlying rationale to provide additional guidance.<sup>90</sup> The Court referred to the distinction in *Feist*, distinguishing between “the underlying facts” and “the precise words used to present them.”<sup>91</sup> That characterization is innocent enough, but it does not tell us how to distinguish between the two, and the Court’s additional gloss provides no help. It adds,

In *Harper & Row*, for example, we explained that President Ford could not prevent others from copying bare historical facts from his autobiography, but that he could prevent others from copying his “subjective descriptions and portraits of public figures.” Where the compilation author adds no written expression but rather lets the facts

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the point is often ignored when the idea/expression distinction is applied to factual works, where analyses often purportedly turn on determining what was the author’s idea. Thus, even in a discussion as sophisticated as that in *Kregos v. Associated Press*, 937 F.2d 700 (2d Cir. 1991), decided a few months after *Feist*, the majority opinion and dissent characterized their difference in terms of what idea the author of the work, a form with baseball information, intended to express. However, as long as an author’s intent is to say something true, as it was in *Kregos*, what the author thinks of as his idea should be irrelevant to the scope of protection accorded to his work. We would hardly expect, in an infringement trial in such a case, the plaintiff to testify as to what his “idea” was in writing the work in question.

90. The idea/expression distinction is typically applied in the form of the merger doctrine, but that doctrine provides no independent rationale for the choice of the idea whose merger is in question or the resulting conclusion as to infringement. The merger doctrine tries to accomplish through the language of idea and expression what is really a matter of the communication of factual content. Idea and expression (or idea and fact) never really “merge,” but the instances in which the merger doctrine treats them as doing so are those in which content can be effectively communicated in only one or a limited range of ways, so a new work that is to communicate such content effectively must use wording identical or very similar to that used by the original work. In *Kregos*, the majority found no merger because it took the idea in question to be at a more abstract level than did the dissent, which found the idea expressed in the author’s form to be a “very specific idea,” *id.* at 711, that could be expressed in a limited number of ways and so “merged” with its expression. *Id.* at 711, 716. The decision turned on the majority’s and dissent’s respective choices of the “idea” in question, but although their thoughtful opinions discuss factors relevant to the scope of protection, their focus on the idea/expression distinction instead of on the issue of the content to be communicated by the work blurred what should have been the dispositive issues. The Second Circuit’s treatment of basically the same issue soon thereafter in *CCC Info. Servs., Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994), further demonstrates the difficulty of addressing the scope of protection issues that arise in the case of factual compilations in terms of the idea/expression distinction (and so the merger doctrine). *Id.* at 69-73. In neither *Kregos* nor *CCC* did the court invoke the fact/expression distinction as an alternative to or for further guidance in applying the idea/expression distinction.

91. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

speaking for themselves, the expressive element is more elusive.<sup>92</sup>

However, the choice in determining the scope of protection is seldom between "bare historical facts," even if we know what they are, and "subjective descriptions." Most history consists of neither extreme but of attempts to objectively and coherently describe a world that does not come to us divided into any kinds of facts.<sup>93</sup> The same, of course, is true of other sorts of factual works.

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92. *Id.* at 348-49 (citations omitted) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556-57, 563 (1985)).

93. Consider, for example, the following passage from Barbara Tuchman's *The Guns of August*, a historical work, which describes national responses to the beginning of World War I:

In France war came and was accepted as a kind of national fate, however deeply a part of the people would have preferred to avoid it. Almost in awe, a foreign observer reported the upsurge of "national devotion" joined with an "entire absence of excitement" in a people of whom it had so often been predicted that anarchical influences had undermined their patriotism and would prove fatal in the event of war. Belgium, where there occurred one of the rare appearances of the hero in history, was lifted above herself by the uncomplicated conscience of her King and, faced with the choice to acquiesce or resist, took less than three hours to make her decision, knowing it might be mortal.

Britain had no Albert and no Alsace. Her weapons were ready but not her will. Over the past ten years she had studied and prepared for the war that was now upon her and had developed, since 1905, a system called the "War Book" which left nothing to the traditional British practice of muddling through. All orders to be issued in the event of war were ready for signature; envelopes were addressed; notices and proclamations were either printed or set up in type, and the King never moved from London without having with him those that required his immediate signature. The method was plain; the muddle was in the British mind.

BARBARA TUCHMAN, *THE GUNS OF AUGUST* 112-13 (1962). We would naturally say that this passage states certain facts about the comparative attitudes of France, Belgium, and Britain at the outset of World War I. One might also express similar content, in a more pedestrian fashion, with the following sentence: "France accepted the onset of World War I calmly, and Belgium's decision to enter the war was led heroically by its king, but Britain, while physically prepared for war as a result of ten years' effort, did not have the will for it." Does this sentence state "the bare facts" expressed by the longer passage, with the rest being a "subjective description" or clothing with "an original collocation of words"? It appears that more than a pleasing style is lost in the transition from the author's passage to the summary sentence. Content is lost as well, for the former contains not only such details as the existence of the British War Book but also the nature of the psychological attitudes so felicitously described by the author. Must one, then, copy the passage almost verbatim in order to convey its factual content? There are no simple answers to such questions, but they cannot be rationally answered without consciously addressing the issue of the information in such a work that we want to be available for further dissemination and the extent to which it can be effectively communicated through different words and organization.

*Focusing on Content*

Both the idea/expression and fact/expression distinctions are instances of the content/expression distinction. The extent to which the content of a work is Section 102(b) content, *i.e.*, is immunized against copyright protection, depends upon whether the work is one of fiction or fact (or, in cases not discussed here, is a computer program). Once we have recognized the critical role of the purpose of a work, and specifically the purpose of factual works of communicating information available to be used in other works, the clearest way of determining the scope of protection of such works is through a principle of immunity that reflects that purpose. Here is a simple version of such a principle, where  $W_1$  is an original work (in the straightforward sense of having been independently created) and  $W_2$  is another work that contains material copied from  $W_1$ :

**Similarities that are reasonably necessary in order for  $W_2$  to express effectively factual content in  $W_1$  should not be counted when determining whether  $W_2$  infringes  $W_1$ .**

A principle of immunity for content communication, as a rationalization and explanation of Section 102(b), does not provide a test for infringement but a limit on the infringement that would otherwise be determined under the substantial similarity standard,<sup>94</sup> which I will not discuss here. Note the following concerning the elements of this form of the principle:

(1) “reasonably necessary”: The similarities must be reasonably necessary in order to meet two goals: expressing factual content in  $W_1$ , and expressing it effectively. The term “reasonably” is an open-textured term, such as the common legal terms “reasonable” (as in “reasonable man”), “substantial” (as in “substantial similarity”), and “due” (as in “due process” or “due care”), that can be applied to take into account appropriate factors in specific circumstances.

(2) “express effectively”:  $W_2$  may contain the same factual content as  $W_1$  but in such a form that it is impractical for readers to find the information they want in it, thus reducing or eliminating the value of that content. The immunity for organizing material in  $W_2$  so that it can be

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94. See, *e.g.*, II GOLDSTEIN § 7.3.1.2 at 7:30 (“[T]he plaintiff must demonstrate not only that the defendant appropriated its protected expression, but also that audiences will find the expression in the defendant’s work substantially similar to the expression in the plaintiff’s work”); 4 NIMMER § 13.03[A] (“Just as copying is an essential element of copyright infringement, so substantial similarity between the plaintiff’s and defendant’s works is an essential element of actionable copying.”); *Towler v. Sayles*, 76 F.3d 579, 583-84 (4th Cir. 1996); *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132, 138 (2d Cir. 1998).

used effectively, even if that makes  $W_2$  more similar to  $W_1$ , addresses this problem. What is reasonably necessary to express content effectively ("effectively" also being an open-textured term) will depend upon the nature of the content, how it is to be used, the nature of the audience, and in some circumstances other factors. A white pages telephone directory is at one extreme, since it consists of small packets of information that can be effectively used only if arranged in a particular manner. Thus in *Feist* it was reasonably necessary for the telephone directory not only to contain certain content but for the content to be in the alphabetical order of the last names of subscribers. In the case of a standard literary work, say a scientific article, the constraints on the arrangement of the content relate more to such factors as intelligibility (including considerations of anaphora, the picking up by a subsequent linguistic unit of the reference of an earlier unit) and logical flow than to simple accessibility.

(3) "factual content": As is generally the case in discussing factual content, this should be interpreted as "purportedly factual content." Whether or not the statements in  $W_1$  are in fact true is irrelevant. What matters is that they are being asserted, *i.e.*, put forth as being true. On a different point, the term "factual" in this simple form of the principle does not consider the type of factual content that is copied and includes what is sometimes referred to as "opinion." If a statement is put forth as true, whether or not it is "only the author's opinion," it is considered "factual content" in this form of the principle. Nor does this form of the principle distinguish among standard factual content in other respects, *e.g.* in terms of complexity, importance, or availability from other sources.

(4) "factual content in  $W_1$ ": The principle as stated here is intentionally somewhat ambiguous as to how much factual content it can be applied to, but the most natural interpretation is that it applies to any content in  $W_1$ , *i.e.*, as if it read "Similarities that are reasonably necessary in order for  $W_2$  to express effectively *any* factual content in  $W_1$  should not be counted when determining whether  $W_2$  infringes  $W_1$ ." Under this interpretation, the principle may be applied so as to permit the copying of all, or any portion of, the factual content in a literary work, as in the case of a white pages telephone directory. That may be too much immunity in some circumstances.

(5) "should not be counted when determining whether  $W_2$  infringes  $W_1$ ." This means that when comparing  $W_1$  and  $W_2$ , the similarities that fall under the immunity principle should not themselves contribute to a finding of infringement. This does not mean that they must be ignored when determining whether  $W_2$  infringes  $W_1$  as a result of other similarities between them. For example, immune material may be

interspersed among protected material in both  $W_1$  and  $W_2$ , and the organization of the immune material among the protected material may make the organization of the protected material more or less similar in  $W_1$  and  $W_2$  and so make infringement more or less likely. It would, therefore, go too far to say that the immune material should not be "considered" when determining whether  $W_2$  infringes  $W_1$ .

As points (1)-(5) make clear, the principle as stated here leaves open a number of issues. A central issue in any such principle is when two works express the same content (and so, if the content purports to be factual, the same factual content). The issue is not straightforward and may benefit from further analysis. On a related point, we may (or may not) want to try to distinguish between "fact" and "opinion," and so provide a further gloss on the term "factual" as it appears in the principle. In another direction, we may feel that the principle in its simple form provides too much protection, because it fails to take account of the information possessed by the intended audience for a work, and so permits  $W_2$  to be more similar to  $W_1$  than would be necessary if one took advantage of the knowledge of that audience. In that case, we might want to modify the principle to the following relativized version:

**Similarities that are reasonably necessary in order for  $W_2$  to express effectively to the intended audience factual content in  $W_1$  should not be counted when determining whether  $W_2$  infringes  $W_1$ .**

Under this version of the principle, if  $W_2$  is directed to an audience possessing specialized knowledge, *e.g.*, molecular biologists or soccer fans, then we need not permit  $W_2$  to be as similar to  $W_1$  as it might otherwise have to be, because the specialized knowledge will enable readers to make inferences where persons without such knowledge would have to be told something directly.<sup>95</sup>

Of course, the more flexibility we incorporate into an immunity principle, the less certain its application in any specific circumstance. The balance is a delicate one, as it must be in light of the paradox of copyright protection. As in any situation in which the application of open-textured terms, such as "reasonably" or "effectively," or difficult terms such as "content," must be determined, the determination should be made on a principled basis. In the case of the principle of immunity for content communication, that basis should be supplied by the underlying purpose of copyright law, the promotion of knowledge and

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95. In a simple case, for example, if  $W_2$  is directed to a group that knows that all and only A's are B's,  $W_2$  may not have to copy the use of "A" in  $W_1$  but may use "B" instead, in order to convey the content of  $W_1$  to those knowledgeable readers.

learning by encouraging the creation of factual works whose content may be disseminated. As difficult as the balancing that goes into that determination may sometimes be, other factors should not be permitted to skew the application of these critical terms. The appropriate time for such other considerations to enter, if at all, is in determining in a specific case whether there should be a fair use exception to a finding of infringement.

The possible need to add flexibility to the principle of immunity for content communication and the need for open-textured terms in the principle are not reasons to favor an analysis using the idea/expression or fact/expression distinctions or the merger doctrine (much less *Feist*'s originality+creativity requirement). Application of those approaches involves, or should involve, implicit application of the factors that are explicit in a principle of immunity, but those approaches provide neither a rationale or guidance for applying such factors in the case of factual works nor a satisfactory alternative rationale for the determinations made under an immunity principle. The express appearance of the factors in such a principle enables us to consider them rationally, not ignore them or hide their application under the guise of deciding what qualifies as an "idea." To the extent that an immunity principle leaves some uncertainties and ambiguities unresolved, it identifies them and enables us to knowingly address them on a principled basis. By contrast, reliance on tendentious applications of the idea/expression distinction or merger doctrine or on arbitrary decisions as to what constitutes a "modicum" of creativity tends to sweep such questions under the rug, leaving the true reasons for decisions as to infringement unexplained and unexplored.<sup>96</sup>

## Conclusion

*Feist Publications, Inc. v. Rural Telephone Service Co., Inc.* marked an important recognition by the Supreme Court of the importance of not

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96. Other characterizations of the limits of copyright protection for factual works also miss the critical importance of the transmission of factual content. For example, the Nimmer treatise suggests that the amount of similarity required in order for  $W_2$  to be "substantially similar" to  $W_1$  "may vary according to circumstances," with "more similarity [ ] required when less protectible matter is at issue," and "supersubstantial similarity" required when dealing with "thin" works." 4 NIMMER § 13.03[A]. However, there is no rationale for such a test. If  $W_2$  has a "supersubstantial similarity" to  $W_1$  because of virtual identity of factual content that cannot otherwise be effectively communicated, there may be no infringement, whereas if two works have only "substantial similarity" because of virtual identity of a smaller amount of content that might be conveyed in a quite different way, there may be infringement. It is confusing enough to use the term "idea" tendentiously in determining infringement; changing the "substantial similarity" standard to reach a result based in fact on other criteria only increases the confusion.

permitting copyright protection to interfere with the communication of information by factual works. Unfortunately, the Court chose to explain its decision by introducing a new “creativity” element into the traditional concept of originality as applied to a literary work and by finding in its enhanced originality+creativity requirement the key to the scope of protection. The Court’s argument came down to saying that since factual works refer to things that already exist (only if they are true, but the Court ignored that condition), they cannot be “creative” unless they contain some manipulations (“cloth[ing] facts with an original collocation of words” or providing “an original selection or arrangement”<sup>97</sup>) to add creativity. However, in addition to confusing language and the world and the two parts of Section 102, the Court looked at the wrong point in the life of a literary work, its creation rather than its use. The scope of copyright protection determines how a literary work may be used, and that use should depend upon the purpose of the work.

Once we focus on that purpose, we can provide a limitation on the scope of copyright protection for factual works, in the form of a principle of immunity for content communication. Such a principle enables us to focus on the factors that should determine the scope of such protection, providing an incentive for the creation of works that promote the advancement of knowledge while not unduly restricting the dissemination of such knowledge. The element of creativity, and resulting novel concept of originality, introduced by the Court in *Feist* is irrelevant to such a principle, and it has no useful role to play in determining the scope of copyright protection for factual works.

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97. *Feist*, 499 U.S. at 348.